Filed 7/27/09 Lababedy v. Gisla CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

HAKMAT LABABEDY, Plaintiff and Appellant, v. JOHN GISLA, JR., Defendant and Respondent.	C057863 (Super. Ct. No. 07AS01973)

In September 2005, Jack Ray Bills crashed his car into a Circle 7 store owned by plaintiff Hakmat Lababedy, causing personal injury and property damage. Plaintiff sued defendant John Gisla, Jr., a physician who treated Bills from 1999 to 2001, for negligence and negligence per se based on Gisla's failure to report to the local health officer, as required by Health and Safety Code section 103900, that Bills had a disorder characterized by lapses of consciousness.[1] Concluding defendant

[1] Hereafter undesignated statutory references are to the Health and Safety Code.

owed no duty of care to plaintiff, the trial court sustained defendant's demurrer to the complaint without leave to amend and entered a judgment of dismissal. Plaintiff appeals. We conclude the trial court correctly sustained the demurrer on the complaint before it, but that plaintiff should be allowed to amend. We shall reverse the judgment of dismissal with directions to the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order sustaining the demurrer with leave to amend.

STANDARD OF REVIEW

The standard of review on appeal from a judgment dismissing an action after a demurrer has been sustained without leave to amend is well settled. We exercise our independent judgment as to whether the complaint states a cause of action as a matter of law (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790), giving the complaint a reasonable interpretation and treating the demurrer as admitting all properly pled material facts. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*); *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*).) "We accept as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to it." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567.) If the facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 (*Holland*).) We may also consider matters which may be judicially noticed

(*Zelig, supra,* at p. 1126; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*)), but other than matters that may be judicially noticed, we do not consider any factual claims that are not set forth in the complaint. (*Afuso v. United States Fid. & Guar. Co.* (1985) 169 Cal.App.3d 859, 862, overruled on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 311.) We also do not assume the truth of contentions, deductions or conclusions of law. (*Zelig, supra,* at p. 1126; *Aubry, supra,* at p. 967; *Blank, supra,* at p. 318.) If an amended complaint omits originally pled facts or exhibits, we may take judicial notice of the earlier complaint and "disregard inconsistent allegations, absent an explanation for the inconsistency." (*Holland, supra,* at p. 1447.)

We affirm the judgment if any ground offered in support of the demurrer was well taken, but find error if the plaintiff has stated a cause of action under any possible legal theory. (*Aubry, supra*, 2 Cal.4th at p. 967.) Because we review the court's ruling, not its rationale, we are not bound by the reasons given by the trial court. (*Silver v. Gold* (1989) 211 Cal.App.3d 17, 22; *Franchise Tax Board v. Firestone Tire & Rubber Co.* (1978) 87 Cal.App.3d 878, 883.) "[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry, supra,* at p. 967.) The burden is on the appellant to show a reasonable possibility of curing a defect. (*Blank, supra,* 39 Cal.3d at p. 318.) Appellant may make such

showing for the first time on appeal. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.)

FACTUAL ALLEGATIONS

Applying these standards, the following factual allegations appear in plaintiff's first amended complaint and the exhibits attached to his original complaint. We begin with Bills's 1999-2001 medical visits to defendant and Dr. John Byer.

On July 20, 1999, then 79-year-old Bills visited defendant with respect to an episode he experienced three days earlier where he momentarily lost consciousness while eating dinner. Bills told defendant he felt the episode coming on and Bills's wife said that Bills slumped in his chair for approximately one or two seconds before coming out of the episode.[2] In defendant's chart note for this visit, defendant assessed Bills as having had a syncopal[3] episode with no associated symptoms. Defendant recommended several medical tests and that Bills "not drive until this problem is worked out."

A month later, Bills had a neurology consultation with Dr. Byer at the request of defendant. Bills told Byer about the

---

[2] The complaint alleges Bills's wife said he slumped in his chair for one or two "minutes[,]" but defendant's chart note attached as an exhibit to plaintiff's original complaint, from which plaintiff's allegations otherwise appear to be taken verbatim, indicate Bills's wife said he slumped in his chair one or two "seconds." The exhibit controls. (*Holland, supra,* 86 Cal.App.4th at p. 1447.)

[3] "Syncope" is defined as "loss of consciousness resulting from insufficient blood flow to the brain." (Merriam-Webster's Collegiate Dictionary (11th ed. 2006) p. 1268.)

blackout spells he had been experiencing and that he did not wish to drive home because of them. He told Byer the spells began three months earlier. Bills said he feels lightheaded. With regard to the incident occurring on July 20, 1999, Bills informed Byer that he had tightness in his head, generally felt weak all over, the room appeared to be getting darker, he experienced sensitivity to light, and he had pain behind his eyes. This all lasted about a minute. Bills reported to Byer two other similar episodes which occurred on July 28, 1999, and July 29, 1999. In Byer's report of the consultation, Byer noted Bills had not had any episodes since he started taking two additional medications, but it had been only several days. Byer asked Bills to keep track of his spells and return in a month when further tests might be considered.

Bills returned to defendant on September 22, 1999. Defendant noted Bills continued to have recurrent episodes of losing consciousness. They generally occurred in the afternoon and evening, typically while he was sitting down. He has a lightheaded feeling and he is "vaguely conscious throughout the episode." On one occasion "everything went black." Bills was able to feel the episode coming on as he had a slight headache at the base of his skull and a pressure sensation behind his eyes. Defendant assessed Bills, according to his chart note, as having "syncope, unclear etiology[.]"[4] Defendant planned to

---

[4] "Etiology" means cause or origin. (Merriam-Webster's Collegiate Dictionary (11th ed. 2006) p. 430.)

follow up with Byer "for continued workup of these syncopal episodes" and to see Bills back in six weeks or sooner.

Defendant subsequently saw Bills on November 3, 1999. Bills was continuing to experience episodes of syncope or near syncope. His workup was "negative so far."

On December 12, 1999, Byer diagnosed Bills with "transient migraine incident or attack."

According to a chart note attached to plaintiff's original complaint, defendant saw Bills again on December 16, 1999. Bills told him of Byer's diagnosis. Defendant noted Bills had been placed on a specific medication and that Bills reported he had only one episode in the past month, which was very mild and involved no loss of consciousness. Defendant assessed Bills as having "episode of transient migraine incidents, per Dr. Byer, they appear to be under control." (Capitalization omitted.)

On January 12, 2000, Bills returned for another appointment with defendant, chiefly to have defendant recheck him for difficulties he was having with shortness of breath. Defendant, however, also noted Bills was being followed by Byer for "near" syncopal episodes. Bills experienced another episode while playing a computer game. According to defendant's chart note, Bills noted a tremor in his right hand. The whole episode lasted two to three seconds.

Bills was seen by Byer on February 3, 2000, for follow up evaluation of "transient neurological deficit." Bills reported he had two episodes in December and four episodes in January. On one occasion his right hand trembled and he was confused for

a short time. Bills also told Byer about his shortness of breath, that he was being followed by another doctor and that in a few days he would have a pacemaker placed.

Twenty-two months later, on December 10, 2001, Bills went to the bathroom and passed out for a few seconds. Bills remained on the bathroom floor for approximately 10 minutes because he did not have the energy to get up. Attached to plaintiff's original complaint is a "Triage Call Documentation Report" dated December 10, 2001, reflecting a telephone call from Bills apparently taken by a registered nurse. The report reflects Bills's statement regarding his fainting in the bathroom. The report also notes Bills had low blood pressure the previous night and that he has a pacemaker. The report further indicates Bills's blood pressure remained low one hour prior to the triage call. Bills was given care advice that "another adult should drive[]" and was referred for an appointment that day. According to the first amended complaint, defendant "noted that 'another adult should drive' and told Bills that he should not drive."

Plaintiff's first amended complaint next alleges that "[o]n September 9, 2005, at approximately 3:30 p.m., Bills's motor vehicle crashed through cement barriers into and through the front door of Plaintiff's Circle 7 Store, with Bills at the wheel."[5] Plaintiff further alleged "[d]efendant knew or should

---

[5] Although both parties' briefs on appeal assume the crash was caused by Bills's loss of consciousness, plaintiff's complaint does not allege so, as we will discuss later.

have known that Bills should not drive, based on Bills[’s] continued blackouts and Defendants [*sic*] recommendations to Bills to not drive.” “Defendant failed to notify the Department of Motor Vehicles of Bills[’s] diagnosis as required pursuant to Health & Safety Code § 103900.” “As a result of Defendant’s neglect, Bills drove through Plaintiff’s store causing severe damage.”

On these aforementioned facts, plaintiff stated two causes of action in his first amended complaint; one for negligence and one for negligence per se. Defendant demurred on the ground of insufficiency of the facts to constitute such causes of action. The trial court concluded defendant owed no duty of care to plaintiff and sustained the demurrer without leave to amend. The trial court explained its ruling as follows:

“Whether a defendant owes a requisite duty of care in a given factual situtation (*sic*) presents a question of law determined by the Court. [(]*Myers v. Quesenberry* (1993) 144 Cal.App.3d 888, 891.[)] In this case, the Court finds that the accident in 2005 was not a reasonably foreseeable consequence of defendant’s failure to report to the DMV a lapse of consiousness (*sic*) more than four years prior. As a matter of law, Dr. Gisla owed no duty to plaintiff since there is no special relationship between Dr. Gisla and Bills in 2005 that might give rise to a duty to a potential third party victim, as in *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 436. There is no duty to control Bills in 2005 and no failure

to warn the patient, since it is alleged that Dr. Gisla told Bills not to drive."

DISCUSSION

I.

Background Regarding Section 103900

The requirement for physicians to report persons diagnosed with a disorder characterized by lapses of consciousness was originally added to the Health and Safety Code in 1941 as section 211. (Stats. 1941, ch. 186, § 2.) According to the Legislature, section 211 was added "as a means of reducing motor vehicle traffic hazards." (Stats. 1941, ch. 186.) In 1957, the reporting requirement was moved from section 211 to section 410. (Stats. 1957, ch. 205, §§ 3 & 9, pp. 848-850.) In 1995, section 410 was repealed and section 103900 was enacted. (Stats. 1995, ch. 415 (S.B. 1360), §§ 4 & 57, pp. 2514-2515, 3331.)

Section 103900, subdivision (a), provides, in pertinent part, that "[e]very physician . . . shall report immediately to the local health officer in writing, the name, date of birth, and address of every patient at least 14 years of age or older whom the physician . . . has diagnosed as having a case of a *disorder* characterized by lapses of consciousness."[6] (Italics

---

[6] At the time defendant saw Bills in 1999 and early 2000, a person reportable as having a "disorder[] characterized by lapses of consciousness" was defined by regulation as a person aged 14 or older who had experienced one or more lapses of consciousness "that may be caused by any *condition* which may bring about lapses" or a person who was "subject to lapses of consciousness . . . resulting from metabolic or neurological *disorders*[.]" (Former Cal. Code Regs., tit. 17, § 2572, subds. (1) & (2), italics added.)

added.) Subdivision (b) of section 103900 in turn requires the local health officer to notify the Department of Motor Vehicles (DMV) of every person reported under subdivision (a).

When the DMV receives a report under section 103900 and it determines that the person reported has a disorder characterized by lapses of consciousness or episodes of marked confusion, as defined by the applicable regulations (see fn. 6 *ante*), that affects the individual's ability to drive safely and/or to have reasonable control of a motor vehicle, the DMV "*may* suspend or revoke the driving privilege" of that individual. (Cal. Code Regs., tit. 13, § 110.01, italics added.) The regulations provide a number of factors for the DMV to consider in making such determination, including "[w]hether the disorder is under control with or without medication" (Cal. Code Regs., tit. 13, § 110.01, subd. (d)) and "[a] current medical evaluation of the individual provided by the individual's physician[.]" (Cal. Code Regs., tit. 13, § 110.01, subd. (i).) The DMV does not have to suspend or revoke the person's driver's license. If the DMV determines an individual has a disorder characterized by lapses of consciousness or episodes of marked confusion, the department may also determine upon evaluation of the medical

---

At the time defendant saw Bills in 2001, section 2806, subdivision (a) of title 17 of the California Code of Regulations defined "disorders characterized by lapses of consciousness" as "those *medical conditions* that involve: [¶] (1) a loss of consciousness or a marked reduction of alertness or responsiveness to external stimuli, *and* [¶] (2) the inability to perform one or more activities of daily living; *and* [¶] (3) the impairment of the sensory motor functions used to operate a motor vehicle." (Italics added.)

evidence and all relevant factors that the individual is still able to drive safely and with reasonable control. (Cal. Code Regs., tit. 13, § 110.02.) In such a situation, the DMV may choose to take no action against the individual's driving privilege or it may place the individual on medical probation to monitor the condition. (*Ibid.*)

II.

Plaintiff's Cause Of Action For Negligence

The elements of a negligence cause of action are (1) defendant's legal duty of due care to the plaintiff; (2) defendant's breach of that duty; and (3) the breach was the proximate or legal cause of plaintiff's injuries. (*Weiner v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 835, p. 52.) This case involves the existence of a duty to plaintiff, a question of law which is to be resolved by the courts. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57; *N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1374.)

"[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434 (*Tarasoff*).) "Duty is simply a shorthand expression for the sum total of policy considerations favoring a conclusion that the plaintiff is entitled to legal protection." (*Adams v. City of*

Fremont (1998) 68 Cal.App.4th 243, 265; accord *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933.)

In deciding whether a duty was owed in a particular case, courts look to a number of factors, including "'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.'" (*Tarasoff, supra,* 17 Cal.3d at p. 434, fn. omitted, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, accord *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

"The most important of these considerations in establishing duty is foreseeability. As a general principle, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.' [Citations.] . . . [H]owever, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim." (*Tarasoff, supra,* 17 Cal.3d at pp. 434-435.) This rule is based on the common law's reluctance to impose liability for nonfeasance.

(*Id.* at p. 435, fn. 5; *Hoff v. Vacaville Unified School Dist., supra,* 19 Cal.4th at p. 933.)

In *Tarasoff,* psychotherapists employed by a university hospital failed to protect a young woman victim from a violent patient who was threatening to kill her. (17 Cal.3d at p. 430.) Finding the relationship between a therapist and his patient qualified as a special relationship (*id.* at p. 435), the California Supreme Court held that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." (*Id.* at p. 439.) The discharge of such duty "may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Id.* at p. 431.)

The parties here bring to our attention two other cases that are examples of this kind of duty.

In *Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, treating doctors examined a pregnant woman and determined the fetus had died. (*Id.* at p. 890.) They advised the woman to have the dead fetus removed and directed her to drive immediately to the hospital, although the doctors knew she was emotionally overwrought and that she suffered from an uncontrolled diabetic

condition. (*Ibid.*) On the way to the hospital, the woman lost control of her car due to a diabetic attack and struck Myers as he was standing by the side of the road. (*Id.* at pp. 890-891.) The appellate court concluded negligence liability could be imposed on the doctors because they should have warned the woman not to drive. (*Id.* at pp. 892-893.) The court stated the doctors "should have taken whatever steps were reasonable under the circumstances to protect Myers and other foreseeable victims of [the woman's] conduct." (*Id.* at p. 894.)

In *Reisner v. Regents of University of California* (1995) 31 Cal.App.4th 1195, a 12-old girl received a blood transfusion that was contaminated with HIV antibodies. (*Id.* at p. 1197.) The girl's doctor discovered that fact, but never told either the girl or her parents about the tainted blood. He continued to treat the girl as she became a teenager. Three years after the transfusion, the girl started dating and became intimate with plaintiff, her boyfriend. Two years later, the doctor told the girl she had AIDS, the girl died, and the boyfriend discovered he was HIV positive. The boyfriend sued the doctor and related defendants. (*Id.* at pp. 1197-1198.) The appellate court concluded the defendants owed a duty to warn the girl and her parents of the danger as "a reasonable step to take in the exercise of the standard of care applicable to physicians." (*Id.* at p. 1200.) The court rejected the defendants' efforts to distinguish *Myers, supra,* 144 Cal.App.3d 888, based on there being no "'immediate temporal connection'" between the alleged negligent act and the injury. (*Id.* at p. 1201.) The court

found such analysis begged the question. As the doctor maintained a physician-patient relationship with the girl and knew or reasonably should have known that, as she matured, she was likely to enter into an intimate relationship, the injury to the boyfriend was foreseeable. (*Ibid.*)

Defendant distinguishes these cases mainly based on the claim that he was not Bills's physician at the time of the accident in 2005, i.e., that there was no special relationship, and on the temporal remoteness of the accident from the time when he was Bills's physician in 1999 through 2001, i.e., when there was a special relationship. Neither argument is persuasive.

First, we note that this matter is before us on a demurrer to plaintiff's first amended complaint. The fact that defendant was no longer Bills's physician in 2005 is not contained in either the original complaint, its exhibits, or the first amended complaint. It is not a matter subject to judicial notice. Therefore, we simply may not consider such fact. (*Afuso v. United States Fid. & Guar. Co., supra,* 169 Cal.App.3d at p. 862.)

Moreover, plaintiff does not allege, as we understand the complaint, that defendant breached a duty owed to plaintiff in 2005, but that defendant owed a duty and breached such duty back in 1999 to 2001 when he failed to report the diagnosis of Bills with a disorder characterized by lapses of consciousness as required by section 103900. It is undisputed that defendant and Bills had a physician-patient relationship at that time. The

question properly posed for us is whether, given such special relationship, defendant owed a duty to plaintiff from 1999 to 2001 and if so, the scope of such duty.

Like the court in *Reisner, supra,* 31 Cal.App.4th 1195, and contrary to the view of the trial court here, we do not consider the time lapse between the alleged breach and the injury to be determinative of this initial duty question. As the *Reisner* court found, if plaintiff's injury was otherwise foreseeable, a duty may be found.

Nevertheless, we conclude plaintiff's complaint, as currently pled, fails to establish that plaintiff's injury was a foreseeable risk of defendant's nonfeasance, that is, that the accident was within the range of what was a likely result of defendant's failure to make the report required by section 103900. Therefore, the allegations of the complaint do not establish a duty of defendant to plaintiff to prevent the accident that occurred. We explain.

"Foreseeability" plays a critical role in two areas of the law of negligence. "Because a general duty exists to avoid causing foreseeable injury to another, the concept of 'foreseeability' enters into both the willingness of the court to recognize the existence of a duty, the breach of which permits an action for damages, and into the determination by a trier of fact whether the specific injury in issue was foreseeable." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 654, fn. 3.) The California Supreme Court explained the distinction in *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, footnote 6: "[A]

court's task--in determining 'duty'--is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. [¶] The jury, by contrast, considers 'foreseeability' in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury." (Accord *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1077.)

In considering whether plaintiff stated a cause of action for negligence on demurrer, we consider foreseeability only in the context of the existence of a duty. We evaluate "whether the *category of negligent conduct* at issue *is sufficiently likely to result in the kind of harm experienced* that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe, supra,* 41 Cal.3d at p. 573, fn. 6, italics added.)

If a physician diagnoses a patient as having a disorder characterized by lapses of consciousness and the physician fails to report the patient's condition pursuant to section 103900, which would start the DMV inquiry into the patient's driving privilege, certain risks arise. In the context of section

103900, the most foreseeable risk to the public from such failure to report is that the patient will cause a motor vehicle accident as a result of a lapse of consciousness due to the unreported disorder. Under these described circumstances, we would find a physician, who did not comply with section 103900, has a duty of care owing to persons injured in a motor vehicle accident that was a result of the physician's patient having a lapse of consciousness *caused by the disorder* that triggered the physician's duty to report.[7] After all, the general principle is that a "'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, *with respect to all risks which make the conduct unreasonably dangerous*.' [Citations.]" (*Tarasoff, supra,* 17 Cal.3d at pp. 434-435, italics added.) The risks emanating from the result of the disorder is what makes the physician's failure to report dangerous to other persons. However, the risk that the patient might injure someone in an accident not caused by or unrelated to the disorder is not part of the risk that makes the failure to report dangerous. The

---

[7] In such a case, there would still remain jury questions regarding foreseeability. In considering whether the physician's failure to report the disorder proximately caused the plaintiff's injury, the jury could, for example, consider such factors as whether the physician warned the patient not to drive, whether the physician knew or should have known the patient would not follow that advice, whether the disorder or condition was under control medically, whether the patient continued to experience any lapses of consciousness as a result of the disorder, the length of time between the diagnosis and/or last lapse of consciousness and the accident, and any medical advice given by another physician.

physician does not owe a duty of care to all persons who are injured in any motor vehicle accident caused by the patient.

This is consistent with the foreseeability present in *Tarasoff, supra,* 17 Cal.3d at pages 439, 450 (doctor to whom patient revealed his specific intent to kill identifiable victim and who predicted or should have predicted the patient presented a serious danger to the victim had duty to take reasonable steps to protect that victim), *Myers, supra,* 144 Cal.App.3d at pages 890-891, 894 (doctor who directed emotional patient with uncontrolled diabetic condition to drive could reasonably foresee patient would lose control of car due to a diabetic attack), and *Reisner, supra,* 31 Cal.App.4th at pages 1197, 1199-1201 (doctor who knew or reasonably should have known patient infected with HIV antibodies would have an intimate relationship and transmit such virus).[8]

Applying our view of duty to this case, we discover a hole in plaintiff's allegations. For purposes of demurrer, we accept as true the allegations that defendant knew Bills was diagnosed

---

[8] This is also consistent with the facts in the only case to have directly considered a negligence action based on a physician's failure to report a disorder characterized by lapses of consciousness. (*Lopez v. Southern Cal. Permanente Medical Group* (1981) 115 Cal.App.3d 673, 678 [plaintiffs injured in car accident with person who suffered epileptic seizure sued orthopedic surgeon alleging failure to report epileptic condition under predecessor statute to § 103900, held surgeon owed no duty to plaintiffs--"[w]hatever may be the scope of the obligation created by the statute in question, it is clear its application in all events is confined to a case where the physician in question knows of a *diagnosis* of the specified disorders"].)

with transient migraine incident (transient neurological deficit), which had caused lapses of consciousness, and that defendant was required to report such disorder or condition to the local health officer to start the process for the DMV to consider what to do with Bills's driving privilege. Without such report, and unless another physician made a report, the DMV would presumably be ignorant of Bills's disorder or condition. The kind of harm likely to result--the foreseeable harm against which defendant had a duty to protect--would be that Bills's transient migraine incident disorder or condition would result in him having another lapse of consciousness while he was driving causing him to have an accident. But here, plaintiff's complaint does not allege that a lapse of consciousness caused Bills to crash his vehicle into plaintiff's store, much less that any such loss of consciousness was a result of the transient migraine incident disorder or condition that defendant failed to report pursuant to section 103900. There could be any number of causes for an 85-year-old driver to have a vehicle accident. A physician does not owe a duty of care to protect the public against all such possibilities.

We noted the absence of these allegations and requested the parties submit supplemental briefs addressing the significance, if any, of their absence.

Plaintiff submitted a brief claiming the allegations are not absent from the complaint. We are not persuaded. Plaintiff's first amended complaint contains a section labeled "Facts Common To All Causes Of Action[.]" (Capitalization

changed.) No allegation appears in such section that Bills suffered a lapse of consciousness due to the transient migraine incident disorder or condition that defendant allegedly failed to report, causing Bills to crash his car into plaintiff's store. Plaintiff, however, contends it was his intent to allege such facts and that he did so by his allegations in his causes of action for negligence and negligence per se that his "injury resulted from an occurrence of the nature which the statute was designed to prevent" and that "[t]he injuries and damages caused by Bills were a directly foreseeable consequence of Bills'[s] lapses of consciousness based on Defendant's failure to report Bills'[s] lapses of consciousness after advising Bills not to drive." We find such allegations ambiguous and, in the absence of specific factual allegations in the section identified as "facts," they do not supply the necessary allegation that the accident was caused by Bills's lapse of consciousness, which lapse resulted from his transient migraine incident disorder or condition.

Defendant submitted a supplemental brief contending, in pertinent part, that the missing allegations would not change the fact that Bills's 2005 accident was not the reasonably foreseeable consequence of defendant's alleged failure to report in 2001 Bills's lapses of consciousness due to the disorder or condition. Defendant again emphasizes he discontinued treating Bills in 2001 and so had no way to intervene or prevent the accident from occurring in 2005. Defendant also asserts that plaintiff has not shown how defendant's reporting of Bills in

2001 would have necessarily led to the revocation of Bills's driver's license. Further, even if Bills's license had been revoked, there is no certainty that Bills would not have been driving anyway. We repeat, for purposes of this demurrer, we cannot consider defendant's claim that he was not Bills's treating physician after 2001 (*Afuso v. United States Fid. & Guar. Co., supra*, 169 Cal.App.3d at p. 862) and we do not find the time lapse between the alleged breach and the accident to be determinative of the issue of duty. Defendant's remaining claims, while appropriate considerations for a determination of causation, do not change our analysis of duty.

Nevertheless, on the complaint before it, the trial court did not err in sustaining defendant's demurrer to plaintiff's negligence cause of action on the basis of a lack of duty of care. In his supplemental brief, however, plaintiff expresses a willingness to amend his complaint to state more clearly the necessary allegations, and from his argument in his supplemental brief it appears there is a reasonable possibility plaintiff may be able to do so. (*Schultz v. Harney, supra*, 27 Cal.App.4th 1611, 1623 [plaintiff may make showing of ability to cure pleading defect for the first time on appeal].) Plaintiff should be given leave to amend his complaint to include the specific factual allegations we have discussed, which are necessary to support a finding of duty. We will reverse the judgment of dismissal and remand with directions for the trial court to grant plaintiff leave to amend.

III.

Plaintiff's Cause of Action For Negligence Per Se

As an alternative theory of liability, plaintiff stated a cause of action for negligence per se arising from defendant's breach of his statutory duty to report Bills's disorder or condition to the local health officer as required under section 103900.

Evidence Code section 669 codifies the evidentiary doctrine of "negligence per se." It provides for a presumption that a defendant has failed to exercise due care if: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or injury to his person or property was one of the class of persons for whose protections the statute, ordinance, or regulations was adopted. (Evid. Code, § 669, subd. (a).)

Plaintiff's first amended complaint contains allegations addressing each of these elements and on appeal he argues section 103900 was specifically designed "as a means of reducing motor vehicle traffic hazards." (Stats. 1941, ch. 186.)

However, "the doctrine of negligence per se does not establish tort liability. Rather, it merely codifies the rule that a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm that the

plaintiff suffered as a result of the violation. [Citation.] Even if the four requirements of Evidence Code section 669, subdivision (a), are satisfied, this alone does not entitle a plaintiff to a presumption of negligence in the absence of an underlying negligence action. [Citations.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285-1286, italics omitted.)

Put another way, "'[t]he presumption of negligence created by Evidence Code section 669 concerns the *standard* of care, rather than the *duty* of care.' [Citation.] In order for the presumption to be available, 'either the courts or the Legislature must have created a duty of care.' [Citation.] '[A]n underlying claim of ordinary negligence must be viable before the presumption of negligence of Evidence Code section 669 can be employed. . . . ". . . [I]t is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages."' [Citation.]" (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353.) Thus, it is evident that negligence per se is a legal theory, not a cause of action.

We have determined that plaintiff's complaint, as currently pled, fails to state a duty of care owed by defendant to prevent the accident caused by Bills. The duty of care created by the Legislature in section 103900 is limited to those persons injured as a result of a lapse of consciousness caused by the disorder that should be reported to the local health officer under the statute. Therefore, the trial court did not err in

sustaining defendant's demurrer to plaintiff's cause of action for negligence per se. But since it appears there is a reasonable possibility plaintiff may be able to amend his complaint to cure the defect, we will reverse the judgment of dismissal and remand with directions for the trial court to grant him leave to do so.

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded with directions to the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order sustaining the demurrer with leave to amend, consistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.